

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Ms Marleni Rojas Nanac
REPRESENTATIVE:	Mr David Bastian (MARN: 1685785)
CASE NUMBER:	1824367
HOME AFFAIRS REFERENCE(S):	BCC2017/1884771
MEMBER:	Russell Matheson
DATE:	21 November 2022
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 820 (Spouse) visa: • Public Interest Criterion 4020 for the purposes of cl 820.226 of Schedule 2 to the Regulations

Statement made on 21 November 2022 at 6:53pm

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Spouse) – misleading information in a previous visa application – fraudulent bank statement – insufficient information provided to enable the applicant to comment – previous relationship – compassionate or compelling circumstances – children born of the relationship – emotional and financial hardship to the family – decision under review remitted

LEGISLATION

Migration Act 1958, ss 5, 65, 359
Migration Regulations 1994, Schedule 2, cls 820.211, 820.26; Schedule 4, Public Interest Criterion 4020; r 1.03

CASES

Arora v MIBP [2016] FCAFC 35
Batra v MIAC [2013] FCA 274
Kaur v MIBP [2017] FCAFC 184
Plaintiff M64/2015 v MIBP [2015] HCA 50
Thirikwa v Minister for Immigration & Anor (2016) FCCA 1501 (21 June 2016)
Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 9 August 2018 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
1. The applicant is a 35-year-old female national of Peru. She applied for the visa on 27 May 2017. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl 820.226 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations) because the delegate found that the visa applicant had provided information that was false or misleading in a material particular in respect of the visa application and did not meet Public Interest Criterion (PIC) 4020. The applicant seeks review of the delegate's decision.
2. The applicant appeared before the Tribunal on 16 August 2022 to give evidence and present arguments. The Tribunal also received oral evidence from Mr Andrew Parker, who is the applicant's Partner. The Tribunal hearing was conducted with the assistance of an interpreter in the Spanish and English languages.
3. The applicant was represented in relation to the review. The representative attended the Tribunal hearing.
4. For the following reasons, the Tribunal has concluded that the **matter should be remitted for reconsideration**.

CONSIDERATION OF CLAIMS AND EVIDENCE

5. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl 820.226 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).

6. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in a material particular?

7. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s 5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
8. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
9. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
10. There is evidence before the Minister that the applicant has provided, or caused to be provided, a bogus document or false or misleading information in relation to a visa which the applicant held in the 12 months before this visa application.
11. On 29 April 2013, the applicant provided evidence to the Department that was considered to be of a 'non-genuine' nature.
12. The applicant applied for a student visa on 16 April 2013, which was granted on 7 May 2013, and valid to 31 May 2017.
13. To demonstrate that the applicant had sufficient funds to support herself, she submitted a document purporting to be a bank statement issued by the Banko de Credito Peru (BCP) during the processing of the student visa.
14. Relevant checks were undertaken by the Department, and it was revealed that the document was fraudulent.

On 30 May 2018, the applicant was given 28 days to comment on the suspected 'non-genuine' information supplied to the Department. The applicant was also invited to specify if they believed there were any compelling circumstances affecting the interests of Australia, or compassionate or compelling circumstances affecting the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen, to justify the waiver of any or all of PIC 4020(1) to justify the grant of the visa.
15. On 25 June 2018, the following information was provided to the Department:
 - A written submission from the applicant's representative.

- A letter from BCP signed by Alessandra Ortiz V, dated 1 June 2018, with accompanying translation.
 - Letter from BCP signed by Lucia Zevallos and Milagros Antonio dated 30 May 2018, with accompanying translation.
 - Bank statements in the name of Rojas Camasca Teofilo for the period 1 April 2013 to 31 May 2013, with accompanying translation.
16. The applicant submitted that the documents provided for her student visa application were genuine and provided 2 letters from BCP and a copy of a bank statement to support this.
 17. Further checks were undertaken by the Department on the new bank documents, including the 2 letters from BCP and the bank statements, and the documents were found to be fraudulent.
 18. The applicant claims in her written submission through her representative that information was held back, and not enough detail was given for her to respond to the claim that she had provided fraudulent documents to the Department. The applicant claims that she was not provided an appropriate amount of information to understand the exact nature of the claim of a bogus document. She further submits that because insufficient information was given to her that there was a risk of jurisdictional error that is supported by the following case:

Thirikwa v Minister for Immigration & Anor (2016) FCCA (21 June 2016)

19. The concerns regarding the lack of background information and the need to ensure the applicant has sufficient details of the case have been visited in the Federal Circuit Court of Australia. The precedent set in *Thirikwa v Minister for Immigration & Anor (2016) FCCA 1501 (21 June 2016)* is similar in facts and determines that detailed information need to be provided to the applicant in order to give them a sufficient chance to respond, otherwise jurisdictional error is considered to have occurred.
20. The case occurred at Tribunal level and found that the applicant was not given appropriate details regarding adverse information relating to her application and this hindered her ability to properly address the issues of concern
21. The honourable Judge Heffernan found in *Thirikwa v Minister for Immigration & Anor (2016) FCCA 1501 (21 June 2016)* that [45] “Without the disclosure of the nature and details of that background information, the applicant was not afforded a meaningful opportunity to comment or respond.” In addition, Judge Heffernan also stated, “Without more comprehensive notice of the nature of the information, and the personal information which gave the allegations substance, it is difficult to conclude that the applicant was given a meaningful opportunity to respond.”
22. The applicant’s representative submits that in response to their written request for more information, the delegate responded on 7 June 2018 (Index – Document No. 3) that “We have informed you that the Department conducted checks and found a document to be fraudulent. We have clearly identified the document in question. We have also explained how this is relevant to the client’s Partner visa application. We find that sufficient information has been provided regarding the adverse information to enable the client to comment.
23. The Tribunal notes that correspondence sent internally at the Department (Department File page 398) indicates that the document was confirmed as non-genuine by the bank. The bank does not provide the Department with any detail regarding whether the entire document is fraudulent or whether part of the document had been altered. The Tribunal

accepts that the applicant has been given limited information regarding the document in question and her response to comment on the veracity of the document would be somewhat restricted. Nonetheless, the Tribunal accepts the Department has received a response from BCP on more than one occasion that documents submitted are fraudulent.

24. The Tribunal is satisfied there is evidence that the applicant has given information that is false or misleading in a material particular in relation to the application for the visa when she stated that she had never been in a relationship with another person other than the sponsor when applying for the visa and stated that she had never been married when applying for the relationship certificate. Therefore, the applicant does not meet PIC 4020(1).

Has a visa previously been refused based on a failure to satisfy PIC 4020(1)?

25. PIC 4020(2) requires the Tribunal to be satisfied that the applicant and each member of the family unit have not been refused a visa because of a failure to satisfy PIC 4020(1) in the period commencing 3 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2AA).
26. There is no evidence that a visa was previously refused based on a failure to satisfy PIC 4010(1). Therefore, PIC 4020(2) does not apply.

Should the requirements of PIC 4020(1) or (2) be waived?

27. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in reg 1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.
28. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.
29. The Tribunal is required to consider all the circumstances of the case, including any matters put forward by an applicant, and determine on the evidence whether there are compelling and/or compassionate circumstances justifying the grant of the visa.
30. For the following reasons, the Tribunal is satisfied that the requirements should be waived.
31. The applicant in her statutory declaration states that she first started living with the sponsor after marrying the sponsor in May 2017. The parties provided a copy of their marriage certificate indicating that they were married under the *Marriage Act 1961* at Parramatta, New South Wales, on 13 May 2017. The Tribunal accepts that the parties have been married for over five years. The applicant provided evidence to the Tribunal that she has been in a genuine and continuing relationship with the sponsor throughout this time. The Tribunal has considered whether the genuineness of the relationship provides compelling reasons to waive the PIC 4020 criteria. The Tribunal acknowledges the applicant's claims and has considered the various documents she has provided in support of the claim that the relationship is a genuine and continuing one. However, the Tribunal makes no assessment as to the nature of the applicant's relationship with the sponsor and has accepted at face

value the claims made by the parties that they were, and continue to be, in a genuine relationship together.

32. The Tribunal notes the claim of the applicant to be in a genuine relationship and the documents provided as evidence which are supportive of that claim. The Tribunal notes that the criteria in cl.820.211(2)(a) requires that the applicant is the spouse or de facto partner of the sponsoring partner. This, in part, requires the applicant and the sponsor to be in a genuine, continuing and exclusive relationship. Accordingly, in the circumstances of this case, the Tribunal does not consider the existence of a genuine and continuing relationship to be a compelling reason to waive the PIC 4020 requirements as it is already a criterion which must be satisfied to meet the criteria in cl.820.211(2)(a). In the circumstances of this case, the relationship of itself does not appear to be a compelling reason to waive the PIC 4020 requirements; however, circumstances of the relationship may nonetheless be relevant in deciding whether the PIC 4020 requirements should be waived.
33. While a genuine spousal relationship is considered the basic requirement for a partner visa application, the Tribunal accepts that a genuine relationship could be a compelling reason to waive the PIC 4020 requirements. However, the Tribunal in this case is not satisfied when considering all the circumstances of this couple, that the genuineness, mutual commitment, emotional support, continuing nature and longevity of the parties' relationship are, on their own, circumstances that should compel the Tribunal to wave the PIC 4020 requirements.
34. Since the lodgement of the partner visa application, the applicant and sponsor have had two children together, Elizabeth, born 9 March 2019, at North Sydney Hospital, St Leonards and Bryanna, born 9 April 2021, at Ku-Ring-Gai Hospital, Hornsby. The parties provided copies of the children's birth certificates indicating that they are the parents.
35. As such, the applicant and sponsor have requested, in their written submission and statutory declarations, that the Tribunal place significant weight on the fact that there are dependent children that have been born of the relationship and the emotional hardship the family would suffer if separated from each other.
36. The Tribunal accepts, for the purpose of this review, that the applicant and the sponsor are in a spousal relationship and that they rely on each other for emotional, physical and financial support. Furthermore, the Tribunal accepts that there are dependent children born from the applicant and sponsor's relationship, and that the couple's separation would have a detrimental effect upon the development of their children, and that this in turn would have an negative emotional impact upon the family unit.
37. The Tribunal accepts, in this case, the children would face severe detriment if separated from their parent. Separating the children from their parent for an extended period would be a traumatic experience for them and would negatively impact upon their early development. The Tribunal is of the view children need positive experiences in the early stages of the lives, and to have their mother removed for an extended period at the early stages of their life would cause irrevocable harm, including behavioural, mental, social and learning problems.
38. The Tribunal considers that the birth of children to the relationship, children who are Australian citizens by birth, combined with the positive effect of the emotional, practical and physical support the parties provide to each other and their children in the early years of raising the children, benefits the whole family. The Tribunal considers that a loving, stable, responsive relationship is fundamental to a child's development. For that reason, the Tribunal is satisfied that there are compelling or compassionate circumstances that affect the interests of an Australian citizen that justify the grant of the visa, and for that reason PIC 4020(4) is satisfied.

Has the applicant satisfied the identity requirements?

39. PIC 4020(2A) requires an applicant satisfy the Tribunal as to his or her identity. The visa applicant's identity documents had been provided with the application. No issue with her identity has been raised by the delegate. The Tribunal is satisfied that the applicant meets PIC 4020 (2A).

Has a visa previously been refused based on a failure to satisfy PIC 4020(2A)?

40. PIC 4020(2B) requires that neither the applicant nor any family unit member have been refused a visa because of a failure to satisfy the identity requirements in PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2BA).
41. There is no evidence the applicant or any member of her family unit had been refused a visa because of failure to satisfy the identity requirement.
42. There is no evidence to suggest the applicant does not meet PIC 4020(2B) and therefore the Tribunal is satisfied it is met.

Conclusion

43. Based on the above, the applicant does satisfy PIC 4020 for the purposes of cl.801.226 at the time of decision.

DECISION

44. The Tribunal remits the application for a Partner (Residence) (Class BS) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 (Spouse) visa:
- Public Interest Criterion 4020 for the purposes of cl.801.226 of Schedule 2 to the Regulations.

Russell Matheson
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa; the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa; neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is **false or misleading in a material particular** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s 5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...